Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

THOMAS J. HUCKABY,

Petitioner,

v.

NEW YORK STATE DIVISION OF TAX APPEALS, TAX APPEALS TRIBUNAL, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of New York

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is a state's taxation of 100% of a nonresident's wages even though he performed only 25% of the services that generated the income in the state out of all proportion to his contacts with and benefits from the state, in violation of the Due Process Clause?

Does state taxation of 100% of a nonresident's wages even though he performed only 25% of the services in the state violate the Commerce Clause fair apportionment requirement?

Is the nature of the services performed by a nonresident employee an appropriate basis for classification under the Equal Protection Clause?

PARTIES TO PROCEEDING

The parties to this proceeding include:

Petitioner, Thomas L. Huckaby, resident of the State of Tennessee.

Respondent, New York State Division of Tax Appeals, Tax Appeals Tribunal.

Respondent, Commissioner of the New York State Department of Taxation and Finance.

CORPORATE DISCLOSURE STATEMENT

None of the parties to this action is a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Thomas J. Huckaby respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York.

OPINIONS BELOW

The March 29, 2005 opinion of the New York Court of Appeals has not yet been published but is found at 2005 N.Y. LEXIS 497. (Pet. App. 1.) The opinion of the Appellate Division of the Supreme Court of the State of New York (Third Department) is found at 6 App. Div.3d 988, 776 N.Y.S.2d 125 (3d Dep't 2004). (Pet. App. 29.) The decisions of the New York State Tax Appeals Tribunal (issued May 30, 2002) and the New York State Division of Tax Appeals, Administrative Law Judge Unit (issued February 8, 2001) were unpublished. (Pet. App. 49, 34.)

BASIS FOR JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on March 29, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

> deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The regulation that Petitioners seek to have declared unconstitutional as applied in this case is N.Y. Comp. Codes R. & Regs. tit. 20, § 132.18(a) which provides that:

> If a nonresident employee (including corporate officers, but excluding employees provided for in section 132.17 of this Part) performs services for his employer both within and without New York State, his income derived from New York State sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within New York State bears to the total number of working days employed both within and without New York State. The items of gain, loss and deduction (other than deductions entering into the New York itemized deduction) of the employee attributable to his employment, derived from or connected with New York State sources, are similarly determined. However, any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer.

This regulation was promulgated under the statutory provision of N.Y. Tax Law §631(b), which provides that "[i]tems of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to ... a business, trade, profession or occupation carried on in this state."

STATEMENT OF THE CASE

Petitioner comes to the Court seeking reversal of the judgment of the Court of Appeals of the State of New York, which held that New York's taxation of 100% of Petitioner's wages earned through the performance of services – 75% of which were indisputably performed in Tennessee – is not unconstitutional under either the Due Process Clause or the Equal Protection Clause of the United States Constitution. The Respondents below[1] purport to justify this overreaching under the regulatory "Convenience of the Employer Test," based on the New York location of Petitioner's employer and the fact that Petitioner's employer did not affirmatively prohibit him from working in New York.

Petitioner's case presents the plight of a nonresident telecommuter. Interstate telecommuters comprise a segment of our nation's labor force that is steadily increasing in size and in importance, as are the "boundary" disputes over the extent to which states are entitled to tax their income. Telecommuting is particularly vital for workers who are disabled, elderly or geographically restricted, or who have child care responsibilities that may make it necessary for them to work from their homes. Last year, 44.4 million Americans performed either some or all of their work at home. The Dieringer Research Group, "Telework Trendlines July 2004" (2004 American Interactive Consumer Survey). Nearly 1 in 5 employee-teleworkers reported to a supervisor located in a different state, according to one report from 2000. International Telework Association & Council, "Telework America 2000 Research: Key Findings"

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[1] Both the New York State Division of Tax Appeals, Tax Appeals Tribunal and the Commissioner of Taxation and Finance are Respondents. Petitioner will generally refer to the Respondents collectively as the "Division" or "New York."

(Oct. 2000). A recent federal statute mandated that federal agencies make telecommuting available to eligible employees. P.L. 106-346; P.L. 108-447. Moreover, in his "New Freedom Initiative for People with Disabilities," President Bush has encouraged the use of telecommuting to integrate disabled workers into the country's workforce.

New York State has responded to this phenomenon by seeking to tax certain nonresident telecommuters who perform some but not all of their work outside the State (like Petitioner) on 100% of their income – solely because their employer is located in New York, so long as the worker spent at least one day in New York and the work done outside New York could *conceivably* have been done in New York.

Although a state can tax its residents on all of their income, this Court has declared that a state's power to tax nonresidents extends only to income arising from the nonresident's business or occupation carried on within the borders of that state or from tangible property located in that state. Petitioner does not deny New York's right to tax some of his income – namely, the portion of his income earned through the performance of services in New York, but he submits that the taxation of 100% of his income without regard to where such services were performed is so disproportionate and arbitrary as to be unconstitutional.

The only taxpayer here is the Petitioner, not his employer. The personal income tax imposed is solely Petitioner's burden, not that of his employer. The only income being taxed is that earned by Petitioner for the performance of personal services; that tax is imposed on him without regard to the amount or nature of the income or loss being generated by his employer as an entity. The New York State presence of Petitioner's employer cannot justify

the taxation of 100% of Petitioner's income when he spent only 25% of his working days in New York.

FACTUAL STATEMENT

The procedural history of the case is summarized correctly in the opinion of the Court of Appeals of the State of New York below. Challenges to N.Y. Comp. Codes R. & Regs. tit. 20, § 132.18(a) on federal constitutional grounds explicitly were raised by Petitioner at all administrative review levels of the proceedings below, as well as in all proceedings in the courts below.

In the court of the first instance and in the appellate court, Petitioner argued that the Convenience of the Employer Test violates the Due Process Clause of the U.S. Constitution. *See* Pet'r N.Y. C.A. Br. 14, 17-23; Pet'r N.Y. App. Div. Br. 27-30. The New York Supreme Court, Appellate Division, and the New York Court of Appeals rejected Petitioner's Due Process challenge. (Pet. App. 15, 32.) In the court of the first instance and in the appellate court, Petitioner also argued that the Convenience of the Employer Test violates the Equal Protection Clause of the U.S. Constitution. *See* Pet'r N.Y. C.A. Br. 14, 23-26; Pet'r N.Y. App. Div. Br. 30-32. The New York Supreme Court, Appellate Division, and the New York Court of Appeals rejected Petitioner's Equal Protection challenge as well. (Pet. App. 15, 33.) Furthermore, the Court of Appeals raised and disposed of the question of whether the Convenience of the Employer Test violates the Commerce Clause fair apportionment test. (Pet. App. 9.)

All of the facts were stipulated by the parties. During the period in issue (1994 and 1995), Petitioner was domiciled in Nashville, Tennessee. (R. at 36.) For purposes of the New York State personal income tax, the parties

agreed that Petitioner was not a resident of New York State. (R. at 36.)

From 1983 to July 1991, Petitioner was an employee of a company based in Nashville, Tennessee. (R. at 36.) He lived and worked in Nashville during this period and was domiciled in Tennessee. (R. at 36). Petitioner's duties consisted of developing and servicing computer programs and advising his employer's customers with respect to their use. (R. at 36.)

In 1991, Petitioner's employment was terminated following a business reorganization. (R. at 37.) At that time, Petitioner was hired as an employee of The National Organization of Industrial Trade Unions ("NOITU"), an umbrella organization of which industrial trade unions are members. (R. at 36.) NOITU had been a client of the Petitioner's former employer and Petitioner had worked on projects for NOITU while employed by his former employer. (R. at 37.) Petitioner's duties at NOITU consisted of supporting the Basic Language programs that his former employer had written for NOITU; assisting the New York computer department manager in selecting equipment and application programming language; writing interface programs to facilitate the transfer of data and writing various administrative programs; and supporting all other computer programming areas. (R. at 37.)

NOITU's office was in Jamaica, New York. (R. at 37.) Petitioner and NOITU agreed that Petitioner, who had served NOITU from Nashville in the past, would perform his services in Nashville. (R. at 37.) They further agreed that Petitioner would come to NOITU's New York office only when needed to work on guidance for revision of existing or creation of new computer programs and to instruct NOITU's New York personnel in their use. (R. at 37-38.)